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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 139

NATIONAL PLATE AND WINDOW GLASS COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

NATIONAL PLATE AND WINDOW GLASS COMPANY, INC., *Petitioner*, v. UNITED STATES OF AMERICA, *Respondent*.	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled proceeding on April 7, 1958.

Citations to Opinion Below

On June 27, 1957, the U. S. District Court for the Eastern District of New York granted petitioner's motion to quash a Commissioner of Internal Revenue Summons duces tecum issued pursuant to Section 7602 of the U. S. Internal Revenue Code of 1954. No written opinion was given by Chief Judge Robert Inch of the U. S. District Court for the Eastern District of New York, the motion to quash being granted by endorsing petitioner's motion papers. The opinion is not officially reported (R. 74). The opinion of the U. S. Court of Appeals reversing the U. S.

District Court (dated April 7, 1958) (R. 76-78) printed in Appendix "B", reported at 1 AFTR 2d page 58-1373.

Jurisdiction

The judgment of the U. S. Court of Appeals was entered on April 7, 1958 (R. 76-78) p. 19 *infra*. Rehearing was denied on April 28, 1958. Jurisdiction of this Court is involved under Title 28, U. S. Code, Section 1254(1).

By stipulation between the parties it has been agreed that the enforcement of the order of the U. S. District Court for the Eastern District of New York upon the issuance of mandate by the U. S. Court of Appeals for the Second Circuit, which reversed the order of the U. S. District Court quashing the Commissioner of Internal Revenue Summons issued under Section 7602 of the U. S. Internal Revenue Code of 1954, will be stayed pending the filing with the U. S. Supreme Court on or before June 30, 1958 of a Petition for a Writ of Certiorari and until such time as the Supreme Court of the United States makes disposition of such petition.

Questions Presented

1. When a deficiency in tax is determined by the Commissioner of Internal Revenue for a taxable year by the issuance of a "90-day letter" under Section 6212(a) of the Internal Revenue Code of 1954, and a petition for a redetermination thereof is filed in the Tax Court of the United States:

(a) May the Commissioner issue a valid and constitutional "summons" for the taxpayer's books and records and to give testimony for the same year under the general power provided in Section 7602 of the

Internal Revenue Code of 1954, without regard to the rules and regulations of the Tax Court governing the issuance of subpoenas for the records of litigants and taking of testimony?

(b) Does Section 6212(c) of the Internal Revenue Code of 1954 prohibiting the Commissioner from making any additional deficiency for the same year involved in the Tax Court, except for fraud, vest in the Tax Court exclusive jurisdiction to determine and redetermine the correct tax liability including the procedures to be followed in asserting such deficiency by the Commissioner?

2. To obtain an examination of the books and records of a taxpayer for a year before the Tax Court of the United States, on the ground of alleged fraud under the exception provided in Section 6212(c), is the Commissioner required only to show a bona fide suspicion of fraud, as held by the Court below, or must he establish to the satisfaction of a Court that he has probable cause or a reasonable basis to believe fraud exists as held by the First and Ninth Circuits?

3. Where an examination has already been made, must the Commissioner comply with Section 7605(b) of the Internal Revenue Code of 1954 in issuing a summons under Section 7602?

Statutes and Regulations and Constitution of the United States

The Statutes, Regulations and applicable Constitutional provisions are separately set forth in Appendix "A" attached to the petition.

Statement

On May 22, 1957, the taxpayer, National Plate and Window Glass Co., Inc., was served with a Commissioner of Internal Revenue Summons duces tecum by Special Agent James A. Duffy; requiring its president to appear and give testimony and produce all books, papers, records and documents for the fiscal years ended August 31, 1953 to August 31, 1956 inclusive. The exact details are set forth in Record below (R. 72).

The taxpayer made a motion on June 4, 1957 in the U. S. District Court for the Eastern District of New York to quash a Commissioner of Internal Revenue Summons duces tecum with respect to the fiscal year ended August 31, 1953 (R. 50); the years 1954 to 1956 inclusive were not involved as the books and records had been made available to the Commissioner's agents.

In a contested hearing before Chief Judge Robert Inch the taxpayer and the respondent filed Memoranda of Facts and Law and thereafter, on June 27, 1957, Judge Inch entered a memorandum decision without opinion granting taxpayer's motion to quash (R. 74).

The respondent filed its Notice of Appeal with the U. S. Court of Appeals for the Second Circuit on August 27, 1957 and on April 7, 1958, the U. S. Court of Appeals for the Second Circuit reversed the order of the District Court. A petition for a rehearing was filed on April 18, 1958 by the taxpayer. Said petition for rehearing was denied on April 28, 1958.

The basic facts in this case may be summarized as follows:

1. The taxpayer duly filed its Federal Income tax return for the fiscal year ended August 31, 1953 with the District Director of Internal Revenue for the District

of Brooklyn, N. Y. and paid the tax shown thereon (R. 60).

2. In connection with an investigation of another corporation, S. Kirschner & Sons, Inc., whose stockholders were the principal stockholders of the taxpayer, Special Agent Murray Waldman of the Intelligence Unit of the Internal Revenue Service, subpoenaed on April 3, 1956 the work sheets of the accountant for that taxpayer and in connection therewith obtained the work sheets of that accountant pertaining to this taxpayer for the fiscal year ended August 31, 1953 and for other years (R. 65).

3. The taxpayer's return for the fiscal year ended August 31, 1953 was under investigation of the Commissioner of Internal Revenue's agents from June 7, 1956 through November 14, 1956, the date of issuance of the statutory notice of deficiency (R. 70, 71), and on or about October 22, 1956, Revenue Agent Uberall of the Office of the District Director of Internal Revenue, Upper Manhattan District, New York, requested a waiver of the Statute of limitations (Form 872) to be signed covering the fiscal year ended August 31, 1953. The taxpayer through its attorney offered the books and records of the taxpayer for examination with the request that the examination be completed within the statutory period of limitations (R. 58).

4. On November 14, 1956, the Commissioner of Internal Revenue issued a 90-day statutory notice of deficiency covering the fiscal year ended August 31, 1953, wherein it stated that on "the basis of information on file with the Internal Revenue Service", the Commissioner disallowed all deductions claimed on the return as not having been substantiated (R. 63-64).

5. On February 7, 1957, taxpayer filed its petition with the Tax Court of the United States (R. 59).

6. Neither in the 90-day statutory notice of deficiency of November 14, 1956 nor in the Answer of the Commissioner of Internal Revenue filed on April 4, 1957 with the Tax Court of the United States was an issue of fraud raised (R. 63-64).

7. On June 19, 1957, at the Arguments of the Motion in the U. S. District Court to quash the Commissioner of Internal Revenue summons, it was agreed by counsel for the parties that the years 1954, 1955 and 1956 were not involved in this motion, because the taxpayer had complied; and the records for those years had been submitted to the defendant's agents. Argument and brief in the District Court was therefore confined to the year 1953 only.

The U. S. Court of Appeals for the Second Circuit reversed the order of the U. S. District Court holding "that the subpoena power vested in the Secretary or his delegate by 26 U. S. C. A. 7602 was not extinguished when the taxpayer filed his petition for review of a deficiency asserted by the Commissioner of Internal Revenue with the Tax Court of the United States, and that the power of the Tax Court to increase a deficiency under Section 6214 coupled with the subpoena power under Section 7602 entitled the Commissioner to exercise this subpoena power despite the fact that the case was before the Tax Court of the United States", citing *Bolich* v. *Rubel* (C. A. 2, 67 F. (2d) 894).

The Court below denied that Section 6212(c) which prohibits the determination of additional deficiencies "except in case of fraud" proscribes the right of the Commissioner to use the subpoena to ascertain whether fraud exists, citing *Boren* v. *Tucker*, (C. A. 9), 239 F. (2d) 767; *Application of United States (Carroll)* (C. A. 2), 246 F. (2d) 762; in the *Matter of Levine*, (C. A. 2), 243 F. (2d)

175; and in *Norda Essential Oil & Chemical Co.* v. *United States,* 230 F. (2d) 764.[1]

The U. S. Court of Appeals further decided that Section 7605 was not involved in this proceeding since the determination set forth in the deficiency notice did not constitute an examination within the meaning of Section 7605(b).

Reasons for the Granting of the Writ.

1. The decision of the Court below deprives the Tax Court of the United States of its exclusive jurisdiction to determine and redetermine the correct tax at issue in accordance with the procedures laid down by that Court.

Under the Revenue Act of 1926, Section 274(e), Congress intended to provide the Board of Tax Appeals (now the Tax Court of the United States) with exclusive and complete jurisdiction to determine the correct tax liability for a given year where a petition had been filed with that body. The legislative history indicates that in creating this body the "jurisdiction of the Board is similar to that heretofore held by judges of the Federal District Courts." H. Rep. #1, 69th Congress, 1st Sess., p. 17, S. Rep. #52, 69th Congress, 1st Sess. p. 37.

Complete power was given to this body to prescribe, by appropriate rules, the procedures by or under which issues were to be litigated and determinations made. (Sec. 7453, 1954 I. R. C.) Cf. *Goldsmith* v. *Board,* 270 U. S. 117.

The right of the Commissioner to claim an increased deficiency in the Board of Tax Appeals was provided for

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[1]The Court below erred in the facts of the instant case in citing *Norda Essential Oil & Chemical Co.* v. *United States, supra.* The only issue involved here is the books for the 1953 tax determination. Tax for the subsequent year has already been determined from examination of the books and records, and the books and records for 1953 were not needed for that purpose. See Petition for Rehearing, record pages 83, 95.

the first time in Section 274(e) of the Revenue Act of 1926 (now contained substantially the same in Section (6214(a), I. R. C. 1954). However, any such claim of increased deficiency could only be made by the Commissioner in accordance with the rules prescribed by the Board of Tax Appeals. Conference Comm. Rep., 69th Congress, 1st Sess. H. Rep. 356, amend. #63, p. 40.

The Tax Court of the United States has such jurisdiction as has been conferred upon that body and its predecessor under prior acts, including the Revenue Act of 1926. Sections 7442 and 7453 of Internal Revenue Code of 1954. Specific power to issue subpoenas for the books and records of litigants before it was given the Tax Court. Section 7456, I. R. C. 1954. Indeed, that the Commissioner availed himself of that power by obtaining a subpoena for a taxpayer's books and records from the Board of Tax Appeals is apparent in *United States et al* v. *Union Trust Co.*, 13 F. Supp. 286. Obviously, the materiality and relevancy of any subpoena is best determined by that body which is given the jurisdiction to determine the tax liability.

Congress provided for a specific representative of the Treasury Department to appear for it in the Tax Court. Sec. 7452, I. R. C. 1954. Only such party was given authority, therefore, to obtain the right of subpoena. A Special Agent of the Intelligence Division is not such an authorized person. His function is solely to determine whether facts exist to warrant criminal prosecution. Par. 678 of Internal Revenue Agent Manual of Instructions; *United States* v. *Wolrich*, 129 F. Supp. 528 (S. D. N. Y. 1955); *United States* v. *Manno*, 118 F. Supp. 511 (D. C. Ill. 1954). Nevertheless, the Court below held that the Special Agent's "Summons" was for the possible purpose of asserting an increased deficiency before the Tax Court.

Indeed, the exclusive power in the Tax Court to determine the correctness of the deficiency proposed by the Com-

missioner left the Commissioner without any further power under Section 7602 of the Internal Revenue Code of 1954. That section literally permits a "summons" to be issued for the books and records in order for the Commissioner to determine the correctness of a tax return. Since that issue has been transferred to the sole and exclusive jurisdiction of the Tax Court, the "summons" of the Special Agent was invalidly issued and constitutes a violation of the Fourth Amendment to the Constitution of the United States.

The Commissioner's action, sustained by the Court below, is violative of Rules 44 and 45 of the Tax Court which sets forth its own procedures for summons and depositions. The latter rule [45(c)] specifically prohibits depositions and testimony before either party in a case before the Tax Court without the consent of the opposing party. What the Commissioner in effect has obtained from the Court below is the right to examine witnesses and records before the trial of the case and to adduce the evidence to be presented. This is a procedure not provided for in any rule of the Tax Court and is specifically prohibited in Rule 45. Cf. *Joseph Starr* v. *Commissioner of Internal Revenue*, 226 F. (2d) 721 (C. A. 7).

The decision of the Court below completely frustrates this exclusive power of the Tax Court by permitting the Commissioner to issue a "summons" independently and without regard to the specific right of the Tax Court as provided by Congress.

2. The decision of the Court below violates the intention of Congress to limit examinations of the books and records of taxpayers as indicated in Section 6212(c) of the Internal Revenue Code of 1954, which prohibits the issuance of further deficiency notices, once a case is before the Tax Court of the United States, except for fraud.

Examination of a taxpayer's books and records is to enable the Commissioner of Internal Revenue to ascertain

the correctness of the tax returns filed, and where necessary determine a deficiency. However, once the issue is before the Tax Court no further deficiencies may be determined by the Commissioner, except for fraud. (Sec. 6212(c) of I. R. C. of 1954). After that the correct tax determination is vested in the Tax Court. It is therefore clear that if the Commissioner may not determine additional deficiencies where a case is pending in the Tax Court and examinations of books and records are only for the purpose of determining correctness of tax and possible deficiencies in tax, that the Commissioner may not re-examine a taxpayer's books and records in a case before the Tax Court except in accordance with procedures laid down by that Court. Section 6214 giving the Tax Court the right to determine an increased deficiency upon the claim of the Commissioner does not nullify Section 6212(c) which would be the effect of the decision of the Court below.

3. The above issues are of tremendous importance in the administration and adjudication of tax controversies as to the power of the Commissioner of Internal Revenue versus the power of the Tax Court of the United States to control its own procedures and the litigants before it.

The scope and importance of these issues may be recognized from the fact that there are now thousands of cases presently pending before the Tax Court and thousands of new cases are docketed each year in all of which records could be re-examined as often as the Commissioner of Internal Revenue desires in accordance with the decision of the Court below.

4. The prohibition against the determination of additional deficiencies by the Commissioner in a proceeding before the Tax Court of the United States, as provided in Section 6212(c), except in the case of fraud, will be circumvented where the existence of the possibility of fraud

is alleged by the Commissioner without any showing of reasonable cause for such belief. In this respect, the decision of the Court below is in conflict with *O'Connor* v. *O'Connell*, 1 AFTR 2d page 58—1209 (C. A. 1), *Martin* v. *Chandis Securities Co.*, 128 F. (2d) 731 (C. A.-9).

The Court below referred to the possibility of fraud existing in the instant case as additional reason for enforcing the Commissioner's summons. From the record it is evident that the referral to possible fraud was based solely upon an administrative affidavit of a Commissioner's agent. No specific showing of a reasonable basis for the belief that fraud exists was offered to the District Court, Eastern District of New York, and therefore that Court properly quashed the summons.

The U. S. Court of Appeals, First Circuit, has taken issue with the position of the Court below (Second Circuit) on this very point in *O'Connor* v. *O'Connell, supra*, when it stated the taxing authorities "must establish to the District Court's satisfaction that a reasonable basis exists for a suspicion of fraud, or put another way, that there is probable cause to believe the taxpayer was guilty of fraud." Here the District Court was not so satisfied and as of this date no allegation of fraud has been raised in the Tax Court proceeding. See also *Martin* v. *Chandis Securities Co., supra.*

5. The decision below is wholly contrary to Section 7605(b) of the Internal Revenue Code of 1954, limiting unnecessary examinations except as therein specifically provided.

The Court below rejected the taxpayer's argument that the determination of its tax liability by the Commissioner for 1953 was based upon an examination of its accountant's analysis and work papers of its records (R. 65) and that such examination was one within the meaning of Section

7605(b) of the 1954 Code. There is nothing in the statutes that require the examination to be of any specific records. Cf. net worth and expenditure methods of determining net income which often ignore taxpayer's books and records.

If such examination as was made was one within the purview of Section 7605, it was incumbent upon the Secretary of the Treasury or his delegate, the Commissioner of Internal Revenue, to send a letter advising a re-examination for 1953 was required. Sec. 7605(b). This was not done.

If the Court below is correct in holding that no examination was previously made prior to the issuance of the "90-day letter" (R. 55, 58, 69) within the meaning of Section 7605, then the Commissioner's action in issuing a statutory notice of deficiency, after being invited to examine the records on October 24, 1956 (R. 58) was an arbitrary and capricious act to evade the specific requirements of the Statute of Limitations providing for tax determinations within three years after the return is filed. Sec. 6501(a) of the 1954 Code.

Congress surely intended to treat taxpayer and Commissioner alike with regard to the provisions of the Statute of Limitations. To recognize arbitrary and capricious deficiency determinations by the Commissioner as a vehicle for tolling the Statute of Limitations is a direct circumvention of Congressional intent. It nullifies the statute as far as the Commissioner is concerned but would retain it against the taxpayer. That the Commissioner's action was arbitrary and capricious and solely a vehicle for illegally tolling the Statute of Limitations is seen from the nature of the proposed adjustments—all deductions claimed on the 1953 tax return were disallowed (R. 59, 60). Such arbitrary action is not a true determination of a deficiency and does not affect the running of the Statute of Limitations. *Brown* v. *N. Y. State Tax Commission*, 99 N. Y. S. 2d 73.

This being so the Statute of Limitations ran with regard to the fiscal year ended August 31, 1953 on November 15, 1956 and any deficiencies in tax for that year are barred by the Statute; and the law as expressed in *Zimmerman et al* v. *Wilson* (C. A. 3) 81 F. (2d) 847; *Farmers & Mechanics National Bank et al* v. *United States* (C. A. 3) 11 F. (2d) 348; in re *Andrews Tax Liability*, 18 F. Supp. 804 (D. C. Md.) would apply.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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June 26, 1958

APPENDIX "A"

Statutes and Law Involved

CONSTITUTION OF THE UNITED STATES

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U. S. INTERNAL REVENUE CODE OF 1954

Section 6212—*Notice of Deficiency*

(a) In General. If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B he is authorized to send notice of such deficiency to the taxpayer by registered mail.

(c) Further Deficiency Letters Restricted.

(1) General Rule.—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in Section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, or of estate tax in respect of the taxable estate of the same decedent, except in the case of fraud, and except as provided in Section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in Section 6213(b)(1) (relating to mathematical errors), or in Section 6861(c) (relating to the making of jeopardy assessments).

Section 6214—

(a) Jurisdiction as to increase of deficiency, additional amounts, or additions to the Tax.—The Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or addition to the tax shall be assessed, if claim therefor is asserted by the Secretary or his delegate at or before the hearing or a rehearing.

Section 6501—*Limitations on Assessment and Collection*

(a) General Rule. Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within three years after the return is filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, within three years after such tax became due, and no proceeding in Court without assessment for the collection of such tax shall be begun after the expiration of such period.

Section 7442—*Jurisdiction*

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3 and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stst. 10-87), or by laws enacted subsequent to February 26, 1926.

Section 7452—*Representation of Parties*

The Secretary or his delegate shall be represented by the Assistant General Counsel of the Treasury Department serving as Chief Counsel of the Internal Revenue Service, or the delegate of such Chief Counsel, in the same manner before the Tax Court as he has heretofore been represented in

proceedings before such Court. The taxpayer shall continue to be represented in accordance with the rules and practice prescribed by the Court. No qualified person shall be denied admission to practice before the Tax Court because of his failure to be a member of any profession or calling.

Section 7453—*Rules of Practice, Procedure and Evidence*

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable to trials without a jury in the United States District Court of the District of Columbia.

Section 7456—*Administration of Oaths and Procurement of Testimony*

(a) In General—For the efficient administration of the functions vested in the Tax Court or any division thereof, any Judge of the Tax Court, the Clerk of the Court or his deputies, as such, or any other employee of the Tax Court designated in writing for the purpose by the Chief Judge, may administer oaths, and any judge of the Tax Court may examine witnesses and require, by subpoena ordered by the Tax Court or any division thereof and signed by the Judge (or by the Clerk of the Tax Court or by any other employee of the Tax Court when acting as Deputy Clerk)—

(1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence and other evidence, from any place in the United States at any designated place of hearing.

* * * * *

Section 7602—*Examination of Books and Witnesses*

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) to examine any books, papers, records or other data which may be relevant to such inquiry;

(2) to summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account, containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) to take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Section 7605—

(b) Restrictions on Examination of Taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

REVENUE ACT OF 1926

Section 274(e)

The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax shall be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

MISCELLANEOUS

Committee Reports

House Rep. #1—69th Congress, 1st Session

Senate Rep. #52—69th Congress, 1st Session

Conference Committee Rep.—69th Congress 1st Session

U. S. TAX COURT RULES

Rule 44

Rule 45

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 290—OCTOBER TERM 1957

(Argued March 10, 1958 Decided April 7, 1958)

DOCKET No. 24913

NATIONAL PLATE & WINDOW GLASS CO., INC.,
Appellee,

v.

UNITED STATES OF AMERICA,
Appellant.

BEFORE:

CLARK, *Chief Judge,*

HINCKS, *Circuit Judge,* and BRENNAN, *District Judge*

The United States appeals from an order of the United States District Court for the Eastern District of New York entered without opinion by Inch, *Chief Judge,* granting the taxpayer's motion to quash service of a summons duces tecum issued under 26 U. S. C. § 7602. Reversed with direction.

BERNARD WEISS, New York, N. Y., for appellee.

MEYER ROTHWACKS, Attorney, Dept. of Justice, Washington, D. C. (Charles K. Rice, Asst. Attorney General, Lee A. Jackson and Harry Baum, Attorneys, Dept. of Justice, Washington, D. C.; Cornelius Wickersham, Jr., United States Attorney; and Lawrence G. Nusbaum, Jr., Asst. United States Attorney, Eastern District of New York, Brooklyn, N. Y., on the brief), for appellant.

Per Curiam:

The subpoena power vested in the "Secretary (of the Treasury) or his delegate" by 26 U. S. C. A. § 7602 to § 7605, was not extinguished when the taxpayer filed with the Tax Court his petition to review the Commissioner's asserted deficiency for the fiscal year 1953. Under 26 U. S. C. A. § 6214, the Tax Court has power to assess a deficiency greater than that originally determined by the Commissioner. And the subpoena powers provided by the above-cited sections of the Code of 1954 are available to support the Commissioner's position in the Tax Court. *Bolich v. Rubel*, 2 Cir., 67 F. 2d 894.

Nothing in 26 U. S. C. A. § 6212 purports to restrict the subpoena power of the "Secretary or his delegate" under the statutory provisions above cited. The restriction in § 6212 which prohibits the determination of additional deficiencies "except in case of fraud" does not proscribe resort to subpoena in an effort to ascertain whether fraud exists. Especially is that so when, as here, a possibility of fraud appears. *Boren* v. *Tucker*, 9 Cir., 239 F. 2d 767, at page 773. Cf. *Application of United States (Carroll)*, 2 Cir., 246 F. 2d 762, cert. den. 355 U. S. 857; and *In the Matter of Levine*, 149 F. Supp. 642, aff'd 2 Cir., 243 F. 2d 175. Moreover, the records sought below may well have been pertinent to investigation of the appellee's tax liability for 1954-1956. For those liabilities, so far as appears, no notice of deficiency had been mailed and no petition for review by the Tax Court had been filed. Consequently, § 6212 by its plain terms was inapplicable. *Norda Essential Oil & Chemical Co.* v. *United States*, 2 Cir., 230 F. 2d 764, cert. den. 351 U. S. 964.

Nor was the order below required because of the provisions of 26 U. S. C. A. § 7605(b), which without special authorization restricts the Internal Revenue Service to "only one inspection." The cursory examination of the taxpayer's

records on February 28, 1957 was not shown to have completed the investigation; it did not constitute an "inspection" within the meaning of this statute. Ten days thereafter the taxpayer refused access to the records. And any examination of the records prior to February 28, 1957 was incident to the investigation of another related corporation.

Taxpayer's contention that the summons was too broad must fail in the light of *Civil Aeronautics Board* v. *Hermann*, 353 U. S. 322. And his claim that the summons violates his constitutional privileges under the Fourth Amendment is wholly lacking in substance. *Bolich* v. *Rubel, supra.*

Reversed with a direction to deny the motion to quash and to enforce the summons.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL PLATE & WINDOW GLASS CO., INC.,
Appellee,

v.

UNITED STATES OF AMERICA,
Appellant.

Before CLARK, Chief Judge, HINCKS, Circuit Judge, and BRENNAN, District Judge.

On Petition for Rehearing.

Bernard Weiss, New York City, for appellee.

PER CURIAM.

Petition for rehearing denied.

C. E. C.
C. C. H.
U. S. C. JJ.

S. W. B.
U. S. D. J.

April 28, 1958